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Supreme Court, U.S.
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No. 04-758

IN THE

Supreme Court of the United States

SOLOW BUILDING COMPANY, LLC,

Petitioner,

v.

MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

RESPONDENT'S OPPOSITION TO CERTIORARI IS WITHOUT MERIT

The Relevant New York State Court Decisions Do Not Apply the Federal Arbitration Act Even in Cases "Affecting Commerce"

Respondent claims there is no conflict between the failure of the New York State courts to apply the Federal Arbitration Act ("FAA") standard of review to arbitration awards "affecting commerce," including the arbitration award at bar, and this Court's decisions in *Citizens Bank v. Alafabco, Inc.* and *Wien & Malkin LLP v. Helmsley-Spear, Inc.* (Opp Br. at 2). In order to make this claim, respondent misdescribes the relevant New York State court decisions.

The New York Court of Appeals has stated repeatedly the grounds on which an arbitration award can be vacated under New York law, and they do not include "manifest disregard of the law." *E.g., United Fed'n of Teachers v. Bd. of Educ.*, 1 N.Y.3d 72, 79 (2003) (grounds for vacating arbitration award under New York law are whether award "violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power"). *See also Banc of America Securities v. Knight*, 4 Misc.3d 756, 781 N.Y.S.2d 829, 834 (N.Y. Sup. 2004) ("there is no 'manifest disregard' or equivalent New York standard as a basis for a New York Court acting under New York law to set aside an arbitration award").

In contrast, the Courts of Appeals of every federal circuit recognize the "manifest disregard of the law" standard under the FAA. Petition at 4-5. The case at bar illustrates this conflict clearly,[1] and therefore is an ideal vehicle for review.

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1. Respondent errs in its contention that the State court below reviewed the arbitration award in this case under the FAA standard. *See* Opp. Br. at 5. The Appellate Division *only* applied the New York (Cont'd)

The crux of the matter is that the New York State courts have taken an unduly narrow view of what "affects commerce." It misses the point for respondent to argue that the New York State courts have applied the FAA standard of review in cases where those courts determined that the FAA governed. *E.g. Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103 (N.Y.A.D. 1st Dep't 2003). The problem is that the New York State courts have acted contrary to federal law – the FAA – in determining whether the FAA applies in the first place. *See Wien & Malkin*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *cert. granted*, 540 U.S. 801, 124 S. Ct. 222 (2003).

Here, in a factual situation nearly identical to that of *Wien & Malkin*, the State court below applied the New York State law standard of review, ostensibly because the transaction did not "affect commerce." However, the transaction *did* "affect commerce" as contemplated by this Court in *Citizens Bank* (Commerce Clause power should be extended to all economic activities that, "in the aggregate . . . would represent 'a general practice . . . subject to federal control'").

In *Wien & Malkin*, this Court remanded the matter to the New York State Appellate Division, First Department to determine, *inter alia* "whether the transaction at issue 'affected commerce'". *Wien & Malkin*, 300 A.D.2d 32 (N.Y.A.D. 1st Dep't 2002), *cert. granted*, 540 U.S. 801, 124

(Cont'd)

State standard of review, not the "manifest disregard of the law" standard. *Solow Bldg. Co.*, 6 A.D.3d 356 at 356 (N.Y.A.D. 1st Dep't 2004) (citing *Matter of Silverman (Benmor Coats)*, 61 N.Y.2d 299, 308 (1984)). As the published headnote of the decision below describes its holding: "Court properly granted . . . motion to confirm arbitration award . . . *although award manifestly disregarded injunction, as well as Appellate Division's decision in prior action*. . . ." 6 A.D.3d 356 (emphasis added). In other words, the State court confirmed the award *even though* it was in manifest disregard of the law.

S. Ct. 222 (2003). On remand, the Appellate Division did not reach a clear decision on this point. *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 783 N.Y.S.2d 339, 343 (N.Y.A.D. 1st Dep't 2004). Thus, the issue has been left uncertain and subject to erroneous failure to apply federal law, as this case illustrates. This Court should grant certiorari to resolve the continued uncertainty and error in the State courts as to when the "affecting commerce" test is satisfied and, therefore, when the FAA rather than State law applies to an arbitration award.

The Issue of Whether the Federal Arbitration Act Governs Is Ripe for Review

Petitioner argued at all stages of this proceeding that the FAA "manifest disregard of the law" standard should be applied to the arbitration award at bar. Petition at 2 -3 and n.1. As shown, the Appellate Division, First Department, declined to review the arbitration award under the FAA standard. *Solow Bldg. Co.*, 6 A.D.3d 356 (N.Y.A.D. 1st Dep't 2004) *lv. denied*, 3 N.Y.3d 605 (2004); n.1 *supra*.

Thus, the issue of whether the FAA governs is ripe for review.

CONCLUSION

There is a substantial federal question presented for this Court's review as to whether State courts are systematically ignoring litigants' federal law rights by construing the "affecting commerce" standard too narrowly or ignoring that standard entirely. To clarify when the FAA applies to arbitration awards before the State courts that "affect commerce," a writ of certiorari should issue to review the order of the Appellate Division, Supreme Court of New York, First Judicial Department.

Respectfully submitted,

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